AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration	:	
	:	AAA Case No.
between	:	14 390 00264 11
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CITY OF PHILADELPHIA,	:	Opinion & Award
	:	
"City"	:	Re: Discharge of
	:	William Haviland
- and -	:	
	:	Hearing: November 14, 2013
	:	
F.O.P. LODGE NO. 5,	:	
	:	
"Union"	:	

APPEARANCES

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Nicole S. Morris, Esq., Divisional Deputy City Solicitor

For the Union

JENNINGS SIGMOND, P.C.
Marc L. Gelman, Esq.

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The City discharged Police Officer William Haviland effective December 3, 2010. It did so based upon several alcohol-related charges and one charge of neglect of duty, all of which stemmed from his conduct on November 7, 2010. The charges allege that Haviland violated the following sections of the Police Department's Disciplinary Code: (1) 2-§002-10 (drinking alcoholic beverages while on duty); (2) 2-§008-10 (operating a City vehicle after imbibing alcohol); (3) 2-§004-10 (impaired on duty); and (4) 5-§017-10 (loss/damage to Department property due to negligence). (Joint Exhibit 2; City Exhibit 1.)[1]

The Union, although not contesting the first two charges, contends the City lacked just cause to discharge Haviland. It asks that Haviland be reinstated to his former position with the Department with his discharge reduced to an appropriate lesser penalty.

The basic facts of this case, which have been largely stipulated to by the parties, may be set forth succinctly.

At the time of his discharge, Haviland had been a member of the Department for seven years. His record of prior discipline reflects a February 9, 2009 demotion resulting from his off-duty arrest for driving under the influence of alcohol and the subsequent suspension of his driver's license for sixty days. (City Exhibits 2 & 9.)[2]

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[1] The Union represents that it has not accepted the current Disciplinary Code, but maintains instead that the Department implemented it unilaterally in 2010. (Joint Exhibit 2.) It notes that the implementation of the Code is the subject of an unfair labor practice charge pending before the Pennsylvania Labor Relations Board. In addition, it points out that the Act 111 Board of Arbitration has ruled that notwithstanding the terms of the Code, disciplinary arbitrators are empowered to determine the appropriateness of the penalty imposed by the City in any instance in which just cause to discipline is found.

[2] This discipline, which was imposed pursuant to the Department's 2005 Disciplinary Code, cites violations of §1.75 (Conduct Unbecoming an Officer – repeated violations of Department rules or conduct indicating officer has little or no regard for his/her responsibility as member of the Department) and §5.85 (Disobedience of Orders – driver's license revoked or suspended for more than thirty days). (Joint Exhibit

The events that led to Haviland's discharge took place on November 7, 2010.

On that date, he was working the 3:00 p.m. – 11:00 p.m. shift, and assigned to the Sugar House Casino detail within the 26th District. At approximately 10:00 p.m. that evening, while in uniform, he entered Tyghe's Bar, which is located in the 15th District, where he purchased and consumed an alcoholic beverage. (City Exhibit 4.) After leaving the bar, he returned to his assigned patrol vehicle and drove away from the area.

Sergeant J[redacted] B[redacted] who was one of Haviland's shift supervisors, testified that at approximately 10:30 p.m. that evening, he received notification of Haviland's presence at Tyghe's Bar.[3] In response, he attempted to contact Haviland via his radio, but received no reply. His efforts to contact Haviland by radioing his fellow officers then on duty in the 26th District were also unsuccessful.[4]

B[redacted] related that Haviland eventually returned to the 26th District office. He recalled that at that time, he and Sergeant M[redacted] L[redacted] were standing outside at the rear of the office. According to B[redacted], as Haviland approached, he could smell alcohol on his breath. Further, when questioned concerning the events of that evening, Haviland had difficulty communicating, as his speech was very slurred.

B[redacted] also reported that when questioned where he had been, Haviland stated initially he had been out with his uncle. However, after being advised of the report concerning his presence at Tyghe's Bar, he acknowledged being there and drinking

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3.) The related criminal charge of driving under the influence of alcohol was resolved by Haviland's entry into the Accelerated Rehabilitation Disposition Program. (City Exhibit 9.)

[3] B[redacted] stated that this report came from Police Officer M[redacted] B[redacted], a member of the 15th District, who had responded to a 911 call from a patron at Tyghe's Bar alleging he had been involved in a verbal altercation there with Haviland.

[4] B[redacted] recounted that Officer M[redacted] responded to this radio call by reporting he had just spoken via cellphone with Haviland, who advised he was having difficulty with his radio. Although B[redacted] instructed M[redacted] to notify Haviland to contact him immediately, he received no communication from Haviland.

alcohol. B[redacted] stated that upon further questioning as to the extent of his drinking, Haviland replied that he had drunk a couple of shots and some beers.[5]

B[redacted] also reported that he observed Haviland's radio was severely damaged. Consequently, he took possession of the radio and issued Haviland a property receipt. (City Exhibit 5.)[6]

At this time, L[redacted] relieved Haviland of his service weapon. He explained that he took this action for safety reasons, as he believed Haviland was intoxicated. Thereafter, L[redacted] escorted Haviland to AID, where he submitted to a breathalyzer test. (City Exhibit 7.) On the basis of the test results, L[redacted] issued Haviland a Complaint or Incident Report charging him driving under the influence of alcohol. (City Exhibit 6.)[7] L[redacted] also reported that he placed him on administrative duty, instructing that he was precluded from taking any police action on or off duty. (City Exhibit 7.)

In his testimony, Haviland acknowledged he entered Tyghe's Bar in uniform on November 7, 2010, and while there, consumed one alcoholic beverage. He reported that after leaving the bar, he returned to his patrol vehicle and drove back to the 26th District office. He stated that while en route, he did not receive any radio calls from any of his supervisors, and believed his radio was functioning properly.

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[5] In his testimony, L[redacted] provided a corresponding account of Haviland's physical condition (i.e., odor of alcohol on his breath and slurred speech) as well as his admissions concerning the extent of his drinking. L[redacted] also recalled that when initially questioned concerning his whereabouts, Haviland stated he had been visiting his mother who was ill.

[6] B[redacted] had Haviland's radio delivered to the Department's Mobile Communications Unit, where it was examined by Police Officer J[redacted] M[redacted]. M[redacted] testified that based upon his examination, he concluded the radio had been damaged by being dragged along the road from Haviland's vehicle at a high rate of speed. He cited the severity of the damage to the radio, including the depths of the gouges in the side panels, as supporting his conclusion. (City Exhibit 8.)

[7] The results of this breathalyzer test were subsequently disqualified. All references to those results were redacted from the exhibits presented. Haviland testified that he was acquitted on the charge of driving under the influence of alcohol.

He also recounted that when subsequently questioned by B[redacted] and L[redacted] concerning his whereabouts, he was very forthright confirming his presence and consumption of an alcoholic beverage at Tyghe's Bar. He disputed, however, that he smelled of alcohol or that his speech was slurred. He reported that he had no recollection of telling B[redacted] and L[redacted] how much alcohol he had consumed that evening.

Haviland stated that in November 2010, he had been drinking heavily on a daily basis, and ultimately concluded that he had a drinking problem. He explained that his drinking had increased in both frequency and quantity as a consequence of his brother's death from cancer the preceding year. In response, he entered an in-patient treatment program on or about November 11, 2010, which he successfully completed on December 30, 2010. (Union Exhibit 3.)

Police Commissioner Charles Ramsey testified that he received a report of Haviland's conduct on November 7, 2010 from the Department's Internal Affairs Division. (City Exhibit 3.) He related that after reviewing this information, and considering Haviland's prior disciplinary record, he concluded Haviland should be discharged. (Joint Exhibit 5: Union Exhibit 2.) He explained that Haviland's actions demonstrated such incredibly poor judgment that the he could not continue to serve as a member of the Department. For this reason, he effectuated the termination of Haviland's employment by a Commissioner's Direct Action. (Union Exhibit 1.)

This action prompted the instant grievance. (Joint Exhibit 2.) When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. (Joint Exhibit 3.) Pursuant to their contractual procedures, the parties selected me to hear and decide the case. (Joint Exhibit 1.)

I held a hearing on November 14, 2013, at the offices of the American Arbitration Association in Philadelphia, PA. At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the hearing, I declared the hearing record closed as of that date.

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to discharge the grievant, Police Officer William Haviland, effective December 3, 2010?

2. If not, what shall be the remedy?

Positions of the Parties

The City contends that its discharge of Haviland was for just cause. It maintains that the evidence conclusively demonstrates his guilt on all of the charges.

It highlights that he has admitted to two of the four charges; namely, drinking alcohol while on duty, and operating a City vehicle after imbibing alcohol. Both offenses, it notes, carry a penalty range from a thirty-day suspension to dismissal for a first offense.

Turning to the charge of being impaired while on duty, it asserts that B[redacted] and L[redacted]'s reported observations of Haviland's condition on November 7, 2010, serve to establish that he is also guilty of this charge. This finding, it avers, is further confirmed by Haviland's admission to B[redacted] and L[redacted] that he had consumed a couple of shots and several beers that evening. In addition, it notes that the damage to his radio provides added proof of his impairment.

It argues that in view of this overwhelming evidence of his impairment, the disqualification of the breathalyzer test results is of no consequence. Simply put, the breathalyzer test results are not needed here to prove impairment.

On the issue of penalty, it contends that the established offenses unquestionably call for discharge. It points out that as a police officer charged with carrying a firearm and making decisions on the use of deadly force, his misconduct here jeopardized public safety. It concludes that under the circumstances, he is not due a second chance. Indeed, it notes, he already received a second chance when he received a penalty of less than discharge for his alcohol-related offenses in 2009.

Accordingly, for all these reasons, it asks that his discharge be sustained.

The Union, on the other hand, maintains that the City lacked just cause to discharge Haviland based on the events of November 7, 2010. Although conceding two of the charges (i.e., drinking on duty and driving a City vehicle after imbibing alcohol), it maintains that the City has failed to meet its burden of demonstrating that Haviland was guilty of the charge of being impaired on duty.

It argues that inasmuch as the charge of impairment amounts to an allegation of criminal conduct, the City should be held to the beyond a reasonable doubt standard of proof. On this basis, it reasons that the City's evidence falls woefully short. It highlights that the City failed to demonstrate that either B[redacted] or L[redacted] possess the skills necessary to determine impairment. Indeed, it notes, the City offered no evidence showing that they had any specialized training or extensive professional experience that would qualify them to make such determination. In addition, they did not conduct a field

sobriety test of Haviland. It concludes, therefore, that with the breathalyzer test results having been disqualified, there is simply no proof Haviland was impaired.

Left only with the charges that Haviland has conceded, it concludes, the penalty of discharge is excessive under the circumstances. It points out that the offense for which he was disciplined in 2009 involved a different charge under the Department's 2005 disciplinary code. As such, it cannot support treating the charges established here as constituting a second offense so as to support the penalty of discharge. Instead, his November 7, 2010 misconduct must be treated as a first offense, thus justifying a penalty of no more than one at the low-end of the recommended range.

Accordingly, for all these reasons, the Union asserts that its grievance should be granted, and the requested relief be awarded.

Opinion

There can be no dispute that the City's Police Department has a right and a duty to ensure that its officers adhere to certain standards of conduct while on duty. This no doubt properly includes an expectation that officers will refrain from consuming any alcoholic beverage while on duty. Indeed, the safety-sensitive nature of their duties, which includes making decisions on the use of deadly force, demands no less. To do otherwise would contravene the Department's obligation to safeguard the public that it serves. To this end, the Department has the indisputable right to discipline any officer who violates such expectations of conduct.

The City, of course, carries the burden of proof here. It must demonstrate by a preponderance of the credible evidence that Haviland committed the charged offenses. It must also establish that the level of discipline imposed is appropriate. The Union, on the

other hand, has no corresponding burden. It need not disprove the charges against Haviland. Indeed, he is entitled to a presumption of innocence.

On review, the record convinces me that the City has met its burden. My reasons for this conclusion follow.

In light of Haviland's admissions, the charges of drinking on duty and driving a City vehicle after imbibing alcohol have been conceded. It is only the charge of his being impaired on duty that remains in dispute. Upon examination of the evidence, and giving due consideration to the arguments presented, I am satisfied that this charge has been substantiated.

I conclude that in this context proof of impairment requires a satisfactory showing that the individual's physical or mental abilities were demonstrably weakened or diminished as a result of his/her consumption of alcohol. This standard is entirely consistent with the safety-sensitive role that a police officer performs.

A blood alcohol test would obviously provide the most definitive confirmation of such weakened or diminished capacity. However, the absence of such test results does not preclude a finding of impairment. The standard, as I have described, does not turn on whether the individual's blood alcohol level was at or above some specifically defined limit, as is required for a conviction on the criminal offense of driving under the influence of alcohol. For this reason, proof of impairment may be accomplished by other means. I find that the City has done so here.

The record establishes that Haviland clearly exhibited signs of impairment. Both B[redacted] and L[redacted] consistently testified to smelling alcohol on Haviland's breath.

Likewise, and more importantly, they both confirmed that he had difficulty speaking as he was slurring his words.

I find Haviland's general denial of their observations unconvincing. Moreover, there is his admission to B[redacted] and L[redacted] that he had drunk a couple of shots and some beers that night. It is particularly telling that Haviland was unable to deny this admission, but could state only that he had no recollection of making such a statement.

Finally, we have the matter Haviland's severely damaged radio. On its face, this fact does not evidence that Haviland was impaired. Indeed, plausible explanations for this damage, which do not involve Haviland being impaired, can be readily conceived, such as simple negligence on his part. However, he offered no such account. Such failure, in my judgment, reasonably supports the inference that either his explanation would have been adverse to his position or he simply cannot recall how the radio was damaged. In either case, it adds to the proof of his impairment.

In sum, I find that Haviland was impaired by alcohol while on duty on November 7, 2010.

Having found that Haviland is guilty of all three alcohol-related charges, the question remaining is whether discharge was an appropriate response.[8] Upon review, I conclude that it was.

Drinking alcohol and being impaired at work constitutes very serious misconduct for any employee. The gravity of that misconduct is especially acute when the offending employee is a police officer. The reason is obvious given a police officer's charge to

[8] I also find that Haviland is guilty of the neglect of duty charge (i.e., §5-017-10) based upon the damage to his radio.

protect the public, which necessarily includes making sound decisions on the appropriate use of deadly force with the firearm he/she is authorized to carry.

In view of the totality of the circumstances here, I am compelled to conclude that the penalty of discharge was not excessive. Haviland made some very bad choices for which he must be held to account. He drank on duty in a public place while in uniform. After doing so, he drove his patrol vehicle on a public street. Finally, and perhaps most egregious of all, his drinking resulted in his being impaired on duty.

On balance, I do not find sufficient mitigating circumstances to warrant reducing his discharge to some lesser penalty. His acceptance of his drinking problem and successful completion of an alcohol treatment program, while admirable, simply came too late. Indeed, his 2009 demotion plainly served to put him on notice that alcohol abuse placed his employment with the Department in jeopardy. Having failed to heed that message and seek treat before becoming impaired on duty, he must now accept the consequences of that failure.[9]

Accordingly, based upon all of the foregoing, the Union's grievance is denied.

[9] It should be noted that in referencing Haviland's 2009 discipline, I am not doing so for the purpose of elevating his November 7, 2010 infractions to a second offense for penalty purposes. Instead, I have considered it solely in connection with my assessment of whether there are sufficient mitigating circumstances to support a reduction in the discharge penalty imposed.

AWARD

1. The City had just cause to discharge William Haviland, effective December 3, 2010.

2. The Union's grievance is denied.

December 20, 2013

David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

December 20, 2013

David J. Reilly, Esq.
Arbitrator